STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2009
v	No. 285783 Delta Circuit Court
EDWIN GEORGE SCHROEDER, Defendant-Appellant.	LC No. 07-007855-FH

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of breaking and entering a building with intent to commit a larceny, MCL 750.110(1), and sentenced as a fourth habitual offender, MCL 769.12, to three to ten years' imprisonment. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction resulted from his attempt to steal recyclable beverage cans that had been transferred to Johnson Distributing, a beverage wholesaler. The business also retrieves recycled cans from retailers and crushes them in its recycling building. The general manager of the facility, Andrew Johnson, testified that in addition to the cans it recycles for the retailers, employees stored their own cans from lunches, etc., in bags at the facility. These cans were stored in plastic bags that held 240 cans each, and were distinctively marked on the side to indicate how many cans were inside partially filled bags. In August 2007, Johnson learned that some of these cans were missing from the facility. He also noticed pry marks around the latch of the door to the recycling building. Johnson contacted the police, who installed a portable pressure alarm mat at the door to the station.

At approximately 3:15 a.m. on August 26, 2007, the alarm sounded. Officer LaMarche responded, and when he arrived he walked along a portion of the perimeter of the facility carrying a thermal imaging device. LaMarche observed the heat signature of a person walking from an area near the distributing center through a train yard. He guided other officers to the individual, whom LaMarche identified as defendant. Another officer and his police dog found defendant in bushes near the train yard. The officers subsequently discovered that the door to the facility, which Johnson testified he had locked that evening, was unlocked, and two large bags full of cans were located underneath a light pole behind the building.

Investigators also found footprints similar to defendant's at the place where defendant was detained, in the train yard, and in an area where defendant's car was parked. In addition, an officer who went to defendant's girlfriend's home to ask her to make a statement discovered a large plastic bag in her driveway that was identical to those found at the rear of the recycling building. When the officer questioned defendant's girlfriend about the bag, she told him that defendant had obtained it from the Johnson facility. Also, when detained, defendant was carrying a pair of gloves. Finally, defendant allegedly admitted to LaMarche that he touched the bags the police found behind the building.

At trial, Officer LaMarche also testified regarding defendant's July 2005 breaking and entering of a hobby store. LaMarche stated that he was patrolling the area near the store at approximately 4:00 a.m. when he saw defendant running from the scene. He ordered defendant to stop, and defendant complied. When LaMarche asked defendant why he was running, defendant replied that he was looking for pop cans. LaMarche investigated the area and observed that a broken window had been smashed at the hobby store. A cash register taken from the store and defendant's bicycle were found at a nearby fairground. Defendant told LaMarche that he noticed that the window was broken when he was looking for cans. He acknowledged that he looked inside the store with his flashlight, but he maintained that he did not know anything about a cash register. Later, however, defendant admitted that he had pried open the cash register with a screwdriver.

Defendant argues that the trial court erred in allowing the prosecution to present MRE 404b evidence concerning the 2005 break-in. He contends that the trial court's decision to allow the prosecution to introduce this irrelevant and prejudicial evidence was error and that he is entitled to a new trial. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion occurs when the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269, 272; 666 NW2d 231 (2003). "A trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law." *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005).

In this case, the prosecution proposed to introduce other-acts evidence to demonstrate that the crimes, while approximately two years apart, constituted evidence of a common modus operandi. The prosecutor noted that in both instances, the crimes occurred between 3:00 a.m. and 4:00 a.m. and involved forced entry into buildings, defendant was wearing dark clothing and gloves even though the crimes occurred in midsummer, and in both instances defendant was found near the break-ins and explained his presence by telling the police "grossly exaggerated fabricated stories" involving the alleged search for returnable cans. The trial court agreed that the incidents were similar enough that that the prosecution could reasonably show that they were the "handiwork" of the same individual.

MRE 404(b) prohibits the admission of evidence of prior bad acts to prove a person's character, but the rule permits the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system. The evidence must be offered for a purpose other than to show character or propensity, it must be relevant under MRE 402, and the probative value of the evidence must not be substantially outweighed by the danger

of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004), *People v Sabin* (*After Remand*), 463 Mich 43, 55-56; 614 NW2d 888 (2000). Upon request, the trial court may provide a limiting instruction under MRE 105. *Knox, supra*.

The *Knox* Court discussed the method of analyzing the application of MRE 404b to a request to allow similar-act evidence showing a common plan or system:

> In *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), this Court explained that the prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford*, *supra* at 387. Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded.
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> In *People v Sabin* (*After Remand*), 463 Mich 43; 614 NW2d 888 (2000), this Court specifically examined the exception in MRE 404(b) for evidence showing a "scheme, plan, or system." We clarified that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin*, *supra* at 63. We cautioned both that "logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception of plot," and that "general similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id*. at 64. [*Knox*, *supra* at 509-511.]

Using *Knox* as a guide, we do not find that the trial court abused its discretion in allowing the prosecution to use defendant's prior act as evidence of a common scheme, plan, or system. Although defendant correctly notes that many nighttime break-ins share similar characteristics, he minimizes the peculiarities of the incidents involved here. Most of the similarities noted by the prosecutor, such as wearing black clothing and gloves, appear to be typical. However, defendant's penchant for ostensibly searching for discarded cans during the wee hours of the morning near burgled buildings is certainly distinctive enough to qualify under *Knox*, at least to the extent that we do not find the trial court abused its discretion in allowing the introduction of the other-acts evidence. This "alibi" part of defendant's break-ins constitutes more than a general similarity between the charged and uncharged acts that arguably rendered the evidence of the prior acts relevant for more than just showing defendant's character or propensity to commit the crime.

Regardless, we also note that even if we found that the evidence was inadmissible, defendant still would not be entitled to relief. Under a harmless error analysis, a trial court's nonconstitutional error in admitting evidence is not grounds for reversal unless, after an examination of the entire case, it affirmatively appears more probable that not that the error was outcome-determinative. *Lukity*, *supra* at 495-496. An error is outcome-determinative if it undermines the reliability of the verdict. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d

687 (2001). Here, any probability of unfair prejudice was reduced by the trial court's curative instruction. This instruction provided that the jury could use the other-acts evidence only to determine, "[f]irst, that the defendant used a plan, system, or a characteristic scheme that he has used before or since; or, second, who committed the crime that the defendant is charged with." The court also correctly instructed the jury that it must not use the prior bad-acts evidence for any other purpose and that it must not convict defendant because it thought he was a "bad person" or was guilty of other bad conduct. Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). These limiting instructions were sufficient to alleviate the danger of unfair prejudice.

In addition, the prosecution presented strong evidence of defendant's guilt. Defendant's heat signature was tracked from the site of the break-in, and officers discovered defendant hiding under a bush near the scene of the break-in shortly after the break-in. Two large bags of cans were found near the site of the break-in, and officers discovered another bag of the sort used at the facility in defendant's girlfriend's yard. In light of the substantial evidence introduced to support defendant's conviction, any error by the trial court in admitting testimony concerning the 2005 break-in would be harmless. We thus find any error harmless under the circumstances.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio